Supreme Court, U.S.
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No. 96-1828

In The

Supreme Court of the United States

October Term, 1996

AMANDA CHAPARRO,

Petitioner,

vs.

IBP, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court's holding that Defendant was entitled to judgment as a matter of law in a state law cause of action for retaliatory discharge due to insufficient evidence of a causal connection between the filing of a workers' compensation claim and discharge from employment implicates any federal constitutional rights.

2. Whether the district court's exercise of discretion to exclude testimony of two former employees of Defendant raises any important question of federal law.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, respondent IBP, inc. states that the only interested persons in this proceeding are those persons listed as parties to this proceeding and their attorneys.

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BRIEF IN OPPOSITION

Respondent, IBP, inc., respectfully requests that this Court deny the Petition for Writ of Certiorari which seeks review of the December 24, 1996, Order and Judgment of the United States Court of Appeals for the Tenth Circuit.

STATEMENT OF THE CASE

This civil action was one for retaliatory discharge brought under Kansas state law in which Plaintiff alleged that she was discharged from her employment with Defendant/Respondent on May 14, 1991, in retaliation for having earlier filed a workers' compensation claim. Subject matter jurisdiction in the United States District Court for the District of Kansas was premised solely on diversity of citizenship between the parties.

After the presentation of all of the evidence at trial held between February 6 and 9, 1995, Defendant renewed its F.R.Civ. P. 50(a) motion for judgment as a matter of law. The district court granted that motion on the ground that "there is no legally sufficient basis for a reasonable jury to find for the plaintiff on the issue of retaliation" in light of the applicable evidentiary standard of proof – preponderance of the evidence that is clear and convincing in nature. (Trial transcript, pp. 430, 442). The Tenth Circuit Court of Appeals unanimously affirmed.

Plaintiff was employed on the production line on the slaughter side of Defendant's Finney County (Garden City), Kansas facility from May 8, 1989, until May 14,

1991. Plaintiff alleges that during 1990 she began suffering from left hand pain which she reported to dispensary personnel on October 22, 1990. She commenced medical treatment on December 7, 1990, and she filed a formal workers' compensation claim in February 1991. (Trial transcript, pp. 145, 147, 203, 227, 336). Defendant's dispensary placed Plaintiff in a cumulative trauma disorder program in October 1990, which included monitoring of her health and sending her to a physician, Dr. Welch, for follow-up examinations. (Trial transcript, pp. 304, 335-337). Plaintiff testified that she was never denied access to the dispensary or to Dr. Welch. (Trial transcript, pp. 148, 204).

Pursuant to medical restrictions accommodated by Defendant, Plaintiff was assigned light duty work for most of the time period from December 7, 1990, to May 2, 1991, which she testified she could perform. (Trial transcript, pp. 148, 208-212, 305, 344-345). Because Plaintiff's only complaint on May 1, 1991, was a little pain in her thumb if she worked very hard with it, Dr. Welch determined that she now could lift and carry up to ten pounds, bend and stoop, reach above her shoulder, and use her left hand at work. (Trial transcript, pp. 305-306, 320-321). Dispensary nurse Rhonda Shipley reviewed the modified restrictions and then assigned Plaintiff the position of wrapping or hanging plastic on rounds, which consists of placing plastic wrap on the round part of carcasses. (Trial transcript, pp. 212, 345-346).

Although Plaintiff now concedes she physically was able to perform this job, she nonetheless complained about this assignment. (Trial transcript, pp. 150-151). Shipley telephoned Dr. Welch to verify whether it was

within Plaintiff's physical restrictions. She described the job duties, and Dr. Welch advised that he believed Plaintiff could perform the job. (Trial transcript, pp. 307-308, 347-348). On May 9, 1991, Shipley relayed this medical opinion to Plaintiff. After urging her to consult with Dr. Welch, dispensary personnel scheduled an appointment with him for later that day at Plaintiff's request. Plaintiff saw Dr. Welch alone at his office, and after she described, from her own perspective, the plastic on rounds job, Dr. Welch again advised that she could perform that job. (Trial transcript, pp. 152, 213-214, 310-311, 348). Dr. Welch testified at trial that he remained of the opinion that Plaintiff "should have been able to do that job without any difficulties." (Trial transcript, pp. 309, 311).

On May 10, 1991, Plaintiff returned to work, but later that day, she complained of flu-like symptoms and went home early. (Trial transcript, pp. 153-154, 215, 348-349).

At its Finney County facility, Defendant's attendance policy is reviewed with new employees, including Plaintiff, as part of orientation. (Trial transcript, pp. 198-200, 252-253). The policy provides that three unexcused absences within a twelve-month period, also referred to as no call/no show absences, are grounds for termination. (Trial transcript, p. 30, and Defendant's exhibit 405, Aplee.Supp.App. at 79). If an employee is ill, she must call in, no later than a half hour before the beginning of her shift, to a recorded number located in the personnel office, to let management know she is unable to work. A no call/no show unexcused absence occurs when the employee neither shows up for work nor calls in before her shift is to begin to report that she will not be at work

that day. (Trial transcript, pp. 373, 385-386, and Defendant's exhibit 405, Aplee.Supp.App. at 79). It is insufficient to return to work after several days of illness with a doctor's note indicating that the employee had been ill the entire period of the absence. Defendant must be informed ahead of time of any future absences due to sickness or any other reason. (Trial transcript, pp. 29-30, 33-34, 373, 414).

During her last twelve months of employment, Plaintiff was assessed three unexcused absences. The first was assessed on October 30, 1990, for an absence on October 29, 1990, when Plaintiff was permitted to leave early because of illness but failed to call in or come back to work that day. (Trial transcript, p. 253, and exhibit 401M, Aplee.Supp.App. at 71).

Plaintiff's second and third unexcused absences, which resulted in discharge from employment, occurred on May 11 and May 13, 1991. On May 10, 1991, Plaintiff was sent home early after complaining of nausea and flu symptoms, with instructions to obtain a full release to return to work from her personal physician. (Trial transcript, p. 349). Plaintiff admitted that Shipley instructed her to call in sick every day that she would be off work in addition to obtaining a doctor's release before returning to work. (Trial transcript, pp. 154, 215-216, 349-350).

Although Plaintiff testified that she telephoned Defendant on the morning of May 11, 1991, and reported that she was unable to work that day due to illness, Defendant has no record of this. (Trial transcript, pp. 155-157). Plaintiff testified that she did not call in on May 13, 1991. (Trial transcript, pp. 157-158, 161, 218-219).

On Tuesday, May 14, 1991, Plaintiff returned to work in the plastic on rounds job after giving a written medical release to the dispensary. (Trial transcript, pp. 159, 351-352). Based on the no call/no show absences on May 11 and May 13, 1991, personnel clerks prepared employee action forms which indicated that Plaintiff had been assessed her second and third unexcused absences.

Personnel director Rick Nimrick reviewed and signed the employee action reports and forwarded them to Plaintiff's immediate supervisor, Dennis Jones. Because Plaintiff had three unexcused absences within the past year, Jones advised her that she would be discharged and that she could appeal the decision directly to Nimrick. (Trial transcript, pp. 159-160). Plaintiff met with Nimrick on May 14, 1991. (Trial transcript, pp. 160, 397). She admitted to him that Shipley had told her, before going home ill, that she was required to call in every day that she was absent, and that she had not called in on either May 11 or May 13, 1991. Therefore, Plaintiff was discharged solely because of her three unexcused absences. Nimrick testified that had Plaintiff claimed to have called in on May 11, 1991, he would have had the recorder tape checked to determine whether she had done so. (Trial transcript, pp. 398-401 and Defendant's exhibit 401Q, Aplee.Supp.App. at 73).

Plaintiff alleged at trial that the stated reason for her discharge was pretextual and that Defendant had acted in retaliation for her having filed a workers' compensation claim. Plaintiff attempted to imply that Defendant had a financial incentive to discharge employees with pending workers' compensation claims. Gary Korte, a former in-house attorney for Defendant who defended workers'

compensation claims, testified to the contrary, stating that firing an employee with a pending workers' compensation claim "would usually end up costing more money" to the company. (Trial transcript, pp. 98-100, 135). Furthermore, Nimrick was not involved in workers' compensation claims. (Trial transcript, p. 401).

Plaintiff attempted unsuccessfully to admit into evidence the testimony of Jennifer Dombkowski and Tim Russell. During a preliminary voir dire examination, Dombkowski testified that she never worked at Defendant's Finney County, Kansas facility, had no knowledge of anything that transpired at that facility, that the comments she claimed to have heard at the Emporia, Kansas, facility occurred between October 1992 and July 1993 (more than one year after Plaintiff was discharged from the Finney County plant), that the alleged comments were made by Bob Wallace, an Emporia supervisor, and that she did not know Plaintiff, Nimrick, Dennis Jones, or any nurses working at the Finney County plant. (Trial testimony, pp. 173-176). The district court properly excluded Dombkowski's proposed testimony as not tending to prove any fact in issue. The conversation that Dombkowski proposed to testify about occurred "a significant period after the termination of the plaintiff in this case, but also it's completely removed from the Garden City plant. I think there's no testimony and nothing in this that – in her testimony at least, that would tie this to the management of IBP." (Trial transcript, p. 183). The district court further excluded Dombkowski's testimony on the basis of Federal Rule of Evidence 104(b), for failure to show that evidence relating to the Emporia plant, where Dombkowski had worked, applied to the Finney

County plant, and on the basis of Federal Rule of Evidence 403 relating to the raising of collateral issues and possibility of jury confusion. (Trial transcript, p. 185).

The district court made the same exclusionary ruling regarding proposed testimony of Tim Russell, another Emporia, Kansas, employee who had no knowledge of the Finney County plant or supervisors, or of the circumstances of Plaintiff's employment and discharge therefrom.

REASONS FOR DENYING WRIT OF CERTIORARI

I. SUMMARY OF ARGUMENT

This state common law cause of action for retaliatory discharge presents a fact-specific inquiry into the basis for Plaintiff's discharge for violations of Defendant's absenteeism policy. It does not raise any important issues of federal law. Kansas substantive law, which is applicable to the Defendant's motion for judgment as a matter of law, specifically includes, the Kansas Supreme Court's holding in *Ortega v. IBP, inc.*, 255 Kan. 513, 874 P.2d 1188 (1994), which provides that a plaintiff bears the burden in a retaliatory discharge case of establishing his cause of action by a preponderance of the evidence that is clear and convincing in nature. The district court correctly considered this higher evidentiary standard in ruling on the motion for judgment as a matter of law. "[T]here is no legally sufficient basis for a reasonable jury to find for the plaintiff on the issue of retaliation" in light of the applicable evidentiary standard of proof – preponderance of the evidence that is clear and convincing in nature. (Trial

transcript, pp. 430, 442). In particular, no evidence was presented at trial that reasonable jurors could have found, by a preponderance of the evidence that was clear and convincing in nature, established a causal connection between the exercise of rights under the Kansas Workers' Compensation Act and Plaintiff's discharge for unexcused absenteeism. The district court's entry of judgment as a matter of law in favor of Defendant, affirmed by the United States Court of Appeals for the Tenth Circuit, did not deprive Plaintiff of any constitutional right to jury trial, but rather complied fully with the requirements of Federal Rule of Civil Procedure 50(a). *See Galloway v. United States*, 319 U.S. 372, 389-392, 87 L.Ed. 1458, 1470-1471, 63 S.Ct. 1077 (1943). Finally, the district court's challenged evidentiary ruling was not an abuse of discretion because the proposed testimony of Dombkowski and Russell was not logically or reasonably tied to the decision to terminate Plaintiff.

II. ARGUMENT

A. Entry Of Judgment As A Matter Of Law In This Retaliatory Discharge Case Governed By Kansas Substantive Law Does Not Implicate Federal Constitutional Rights Of The Plaintiff

A petition for a writ of certiorari is granted only for compelling reasons and is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. The factors the Court considers in exercising its discretion to grant a petition for writ of certiorari include whether the decisions of two or more U.S. Courts of Appeals conflict

with each other as to "an important federal question" or if a Court has decided such a question of federal law "that has not been, but should be, settled by" the Supreme Court. Supreme Court Rule 10. "A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States court of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347, 114 L.Ed.2d 385, 391, 111 S.Ct. 1854 (1991).

In the present case, no important federal question is raised by the Tenth Circuit's affirmance of the district court's entry of judgment as a matter of law, no conflict in decisions among appellate courts exists, and no grounds for exercise of this Court's supervisory authority has been demonstrated.

In the first place, this case does not raise any substantial issues of federal law. Kansas substantive law governed Plaintiff's retaliatory discharge cause of action. It is well-established that a federal court is to consider the evidentiary burden applicable at trial in ruling on a motion for directed verdict or judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L.Ed.2d 265, 273-274, 106 S.Ct. 2548 (1986). This includes consideration of the heightened evidentiary standard imposed by the Kansas Supreme Court in *Ortega v. IBP, inc.*, 874 P.2d 1188 (1994), for plaintiffs who pursue common law claims of retaliatory discharge. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 91 L.Ed.2d 202, 213, 106 S.Ct. 2505 (1986).

Secondly, Plaintiff has not asserted that the Order and Judgment of the Tenth Circuit Court of Appeals is in

conflict with any decision of any other federal court of appeals or with a state appellate court. Plaintiff asserts that Kansas is unique in requiring clear and convincing evidence in support of a retaliatory discharge case. Whether or not this is true, the substantive evidentiary standard created under state law, and applied by federal district courts in diversity of citizenship cases as required under the *Erie* doctrine, is not an issue of federal law for which certiorari review is warranted.

Third, Plaintiff acknowledges that "the elements of retaliatory discharge contained in the court of appeals decision" are the correct ones. (Petition for writ of certiorari, at 6). An essential element of a prima facie case of retaliatory discharge under Kansas law is presentation of evidence of a causal connection between the employee's filing of a workers' compensation claim (or other exercise of rights under the Kansas Workers' Compensation Act) and the termination from employment. *Rosas v. IBP, inc.*, 869 F.Supp. 912, 914 (D.Kan. 1994); and *Pilcher v. Board of County Commissioners*, 14 Kan.App.2d 206, 213, 787 P.2d 1204 (1990). Plaintiff is not asserting that the district court or court of appeals relied on an erroneous rule of law in deciding whether sufficient evidence of such causal connection had been presented. Plaintiff is complaining only of erroneous findings of fact, that is, the application of the correct rule of law to the particular factual circumstances surrounding her termination. Both the district court and a three-judge panel of the Tenth Circuit Court of Appeals have reviewed the evidentiary record and determined that Plaintiff had not satisfied her burden of proof that reasonable jurors could have found, by a preponderance of the evidence that is clear and convincing

in nature, that Defendant discharged Plaintiff because she previously had filed a workers' compensation claim.

Plaintiff's belief that the application of Defendant's absenteeism policy to her unexcused absences on May 11 and 13, 1991, was unfair or unjustified does not raise a material question of fact that the decision was causally related to her filing of a workers' compensation claim. Furthermore, Plaintiff's illness of May 10, 1991 was not work-related, and absolutely no evidence was presented that Nimrick knew of her prior work-related injuries or the workers' compensation claim when he discharged her. "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue." Federal Rule of Civil Procedure 50(a)(1).

Finally, the underlying facts in this state law action for retaliatory discharge relate to a single employee, a single course of medical treatment, an attempt by a single employer to accommodate physical restrictions, a single physician's release to return to work, and the failure of a single employee to comply with her employer's attendance policy. No issue or matter of general importance is raised in Plaintiff's Petition for Writ of Certiorari.

B. No Important Question Of Federal Law Is Raised By The District Court's Evidentiary Ruling Regarding Testimony Of Other Employees

Plaintiff also seeks Supreme Court review of an evidentiary ruling of the district court excluding the testimony of two former employees who worked in the Emporia, Kansas plant. Such evidentiary rulings are reviewed pursuant to an abuse of discretion standard which requires the appealing party to demonstrate manifest injustice. *Thompson v. State Farm Fire & Casualty Co.*, 34 F.3d 932, 939 (10th Cir. 1994). While testimony of other employees as to their treatment by an employer may be relevant in assessing an employer's alleged retaliatory intent, the plaintiff must establish that the circumstances involving these other employees can "logically or reasonably be tied to the decision to terminate" the plaintiff. *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 n.2 (10th Cir. 1990). Otherwise, the testimony concerns collateral matters and does not tend to establish any pattern or practice of discrimination or retaliatory motive.

In the present case, Plaintiff proposed to introduce testimony of two former employees, neither of whom were ever employed at Defendant's Finney County plant, neither of whom knew anything about employment practices at that plant, neither of whom could testify about the actions or motives of any supervisory employee at that plant, and neither of whom could testify as to any company-wide management policy. (Trial transcript, pp. 173-178, 188). Dombkowski proposed to testify about alleged conversations she had with Bob Wallace, her supervisor at Defendant's Emporia, Kansas plant, which

allegedly occurred *after* October 1992. By contrast, Plaintiff worked at all times at Defendant's Finney County plant, was never supervised by Bob Wallace, and ended her employment with Defendant on May 14, 1991, a year and a half before Wallace's alleged comments.

Plaintiff did not produce any evidence that the purported testimony of Dombkowski or Russell showed that their situations were substantially similar to that of the Plaintiff in this case or that their testimony suggested a company-wide policy of retaliation against injured employees. The proposed testimony of Dombkowski and Russell was simply too attenuated to create any inference of retaliation in Plaintiff's case. In any event, the abuse of discretion evidentiary issue resolved in Defendant's favor by the Tenth Circuit Court of Appeals does not raise any important issue of federal law about which this Court should exercise its certiorari review authority. The challenged evidentiary decision was fact-specific.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied and the December 24, 1996, Order and Judgment of the United States Court of

Appeals for the Tenth Circuit should be affirmed in all respects.

Respectfully submitted,

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